
THE COMPETITION LAW REVIEW

Volume 12 Issue 1 pp 19-52**September 2016**

Public EU competition law enforcement in small ‘newer’ Member States:
addressing the challenges

*Jurgita Malinauskaite**

The decentralised nature of Regulation 1/2003 meant that all Member States of the EU have an obligation to enforce EU competition law in addition to their domestic equivalent once the criterion of ‘the Effect on Interstate Trade between the Member States’ is triggered. While larger Member States are better equipped to deal with supranational cases, smaller Member States in terms of their limited resources and lack of experience may struggle. Unfortunately, the academic literature on small countries in the EU is scarce and fragmented. Filing the gap in the literature, this paper will argue that ‘smallness’ in competition law does matter, as small Member States are more exposed to the enforcement of the EU competition provisions. Given the obligation imposed by Regulation 1/2003, the paper will further explore the challenges faced by the National Competition Authorities (the NCAs) of small Member States from the post-2004 accession, namely Croatia, Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia and Slovakia in their enforcement of EU competition law.

I. INTRODUCTION

The decentralised nature of Regulation 1/2003 meant that all Member States of the EU have an obligation to enforce EU competition law in addition to their domestic equivalent once the criterion of ‘the Effect on Interstate Trade between the Member States’ is triggered. This in practical terms insinuated that most EU competition cases are decided by at least 28 NCAs with the European Commission focusing on larger pan-European cases.¹ For instance, from 1 May 2004 until 31 December 2012 approximately 88% of all decisions on Articles 101 and 102 TFEU were adopted at national level.²

While the National Competition Authorities have some leverage in the enforcement of their national law, especially in the context of unilateral conduct and merger control, the same cannot be said about Article 101 TFEU. It is important that the EU competition rules are applied and enforced uniformly across Member States to ensure a fair playing field. While larger Member States are better equipped to deal with supranational cases, smaller Member States in terms of their limited resources and lack

* Senior Lecturer in Law, Brunel University London. Any comments are gratefully welcome at jurgita.malinauskaite@brunel.ac.uk. The paper was presented at the CLaSF Workshop “Competition Law Public Enforcement Across the EU”, LUMSA Law School, Rome, 10 September 2015. This article is dedicated to the memory of Brian Tinsley.

¹ See, the statistics provided by the ECN, available at: <http://ec.europa.eu/competition/ecn/statistics.html> (accessed on 20 October 2015).

² See W. Wils, ‘Ten Years of Regulation 1/2003- a Retrospective’, presentation at the conference *10 Years of Regulation 1/2003*, Mannheim Centre for Competition and Innovation, 7 June 2013.

of experience may struggle. Unfortunately, the academic literature on small countries in the EU is scarce and fragmented. Filling the gap in the literature, this paper will argue that 'smallness' in competition law does matter, as small Member States are more exposed to the obligation of enforcement of EU competition provisions. This is because there are several industries where scale economies exceed the demand of a small country. Equally, the current approach employed by the European Commission and the Courts with regard to the broadly interpreted element of 'effect on trade between Member States' implies that this aspect should be easily met in small Member States due to their integrated national markets and therefore, the EU competition law provisions should be applied instead (or simultaneously) of national law. Logically, the application of national law should be fading away. Yet, this is not the case in some small Member States. Building on the ECN statistics,³ the article reveals that there are a lower number of cases where Articles 101 and 102 TFEU were directly enforced in some small Member States during the period from 1 May 2004 to 31 March 2015. While making further distinction between 'older', as the pre-2004 accession Member States and 'newer' referred to the post-2004 accession Member States due to their lack of experience in enforcing competition law and limited resources, the paper selects the following post-2004 wave countries, such as Croatia, Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia and Slovakia. Given the implications of Regulation 1/2003, the paper will explore the challenges faced by the National Competition Authorities (the NCAs) of these small 'newer' Member States in their enforcement of Articles 101 and 102 TFEU. The scope of this article will shy away from any specific investigative or decision making powers. Instead, the paper will canvass the NCAs' capacity of these selected small 'newer' Member States to enforce EU competition law followed with in-depth analysis being placed on the Member States with the lowest degree of enforcement.

Particularly, the paper, first of all, will define small countries and their specific features in the context of this article (Section II). Regulation 1/2003 and its impact on the NCAs especially, in the analysed countries will be evaluated by employing a SWOT analysis in order to discover the extent to which the decentralisation has presented the NCAs with new opportunities as well as obligations (Section III). Section IV will overview the extent to which 'smallness' matters in competition law and its enforcement. Besides the generic part, the following sections will then place emphasis explicitly on the NCAs of small 'newer' Member States and their enforcement. Notably, Section V will discuss the NCAs of these countries and their independence, whereas their policies in place to overcome their limited resources, namely via the creation of 'multi-functional' agencies and the introduction of prioritisation policies will be analysed in Section VI. Finally, enforcement experience of the EU competition provisions and challenges faced by these small 'newer' Member States will be elaborated in Section VII with the concluding remarks being distilled in Section VIII.

³ ECN, n 1.

II. SMALL 'NEWER' EU MEMBER STATES: DEFINITION AND SPECIFIC FEATURES

(i). How small is 'small'?

There is no universal definition of small countries. Size is a relative concept that should be placed in a certain context. Traditionally, three highly correlated indicators, such as a population size, territory and GDP are used to define 'small'. In the literature, small states are often defined by population thresholds, which vary largely from 1.5 million like the Commonwealth Secretariat's definition,⁴ to 5-10 million in the United Nations projects⁵ or even between 10 to 15 million.⁶ Quite often economies in transition are also embraced to a category of small market economies, as a concentration in the economic context is on the ability of small-state economies to survive in a world where economies of scale still dominate.

Given the EU's proportionate representation and smallness as 'a comparative and not absolute idea',⁷ for the purpose of this paper the following matrices have been employed to categorise and classify the Member States in the EU. Firstly, the paper focuses on countries with a population up to 5 million (or just above 5 million) which in the context of total EU population is about 1.1%. Secondly, the paper also sets an economic criterion of GDP below €75.5 billion.⁸ Thirdly, the emphasis of this paper is solely on the post-2004 accession Member States (also referred to as 'newer' Member States in this article). This is because they are less experienced in the enforcement of competition law. Additionally, the GDP and the budget of the NCAs of these countries are significantly lower in comparison with the pre-2004 accession member states. For instance, Malta's GDP is €7.9⁹ billion whereas Luxembourg's GDP is € 49.4 billion –

⁴ For instance, some World Bank projects in their work on small states used a threshold of 1.5 million people and in some instances, larger states, such as Jamaica, Lesotho, Namibia and Papua New Guinea, are included because of their lack of institutional capabilities. See, for instance, World Bank, 'Small States: Meeting Challenges in the Global Economy', Report of the Commonwealth Secretariat/World Bank Joint Taskforce, April 2000, available online at <http://siteresources.worldbank.org/PROJECTS/Resources/meetingchallengeinglobaleconomy1.pdf>; also see World Bank, 'Defining a Small Economy', Projects and Operations, 2007, available online at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:21512464~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (accessed on 25 April 2016).

⁵ For instance, in the United Nations in 1992 created informal group called the Forum of Small States (FOSS) served as a platform for small states with a population of 10 million or below. B. Thorhallsson 'Small States in the UN Security Council: Means of Influence?', *The Hague Journal of Diplomacy* 7 (2012) 135-160.

⁶ For instance, S. Kuznets in 'Economic Growth of Small Nations' used an upper limit of 10 million of the population to define a small country. S. Kuznets 'Economic Growth of Small Nations' in E.A.G. Robinson (ed.) *Economic Consequences of the Size of Nations*, Macmillan, 1960. Harvey W. Armstrong and Robert Read, 'The Phantom of Liberty? Economic Growth and the Vulnerability of Small States', *Journal of International Development*, vol. 14, no. 4, 2002, pp. 435-458.

⁷ The United Nations Institute for Training and Research, UNITAR 1971, at 29.

⁸ There has been no special significance in the selection of particular population or GDP thresholds to define small countries in this paper. Yet, a decision was made to include Slovakia due to the fact that there is a rather large gap between Slovakia and the next biggest newer Member State – Bulgaria with a population of over 7 million.

⁹ See Table 1.

each making up 0.1% of total EU population. Similarly, Denmark and Slovakia each comprise 1.1% of total EU population, but their GDP vary drastically, where the former has € 257.4 billion GDP and the latter €75.2 billion.¹⁰ Therefore, the following countries were identified that met the set criteria: Croatia, Cyprus, Estonia, Latvia, Lithuania, Malta, Slovenia and Slovakia.¹¹

Table 1. Post-2004 accession small Member States

Country	Population (2014)/ mil	EU population (2014)/ %	Territory (2014)/ km ²	GDP (billion)(2014)
Croatia	4.2	0.8	56 594	€ 43.085
Cyprus	0.86	0.2	9 251	€ 17.506
Estonia	1.3	0.3	45 227	€ 19.525
Latvia	2	0.4	64 573	€ 24.060
Lithuania	2.94	0.6	65 300	€ 36.309
Malta	0.425	0.1	316	€ 7.912
Slovakia	5.4	1.1	49 035	€ 75.215
Slovenia	2	0.4	20 273	€ 37.246

(sources: <http://europa.eu/about-eu/countries/member-countries/> & http://europa.eu/about-eu/countries/index_en.htm)

(ii). Specific features of small 'newer' Member States

There are specific features attributable to small 'newer' Member States. In contrast to 'older' Member States, where competition law has been embedded for some time, the 'newer' Member States lack expertise in enforcing the economic principles underpinning competition law, and they also lack credibility in the eyes of the other State institutions, public opinion, and the business community. The NCAs of all analysed countries also suffer from limited resources.¹² The European Commission in its report¹³ identified that the NCAs of several Member States, including Latvia, Malta, and Slovenia suffer from low personnel levels and limited financial resources. It seems that the NCA of these small 'newer' countries are stuck in a loop. On the one hand, they have limited resources due to their smallness and development level of their economies. Yet, the NCAs of these 'newer' Member States are required to allocate extra resources on disseminating information about competition law and on instilling a

¹⁰ See Table 1.

¹¹ Further grouping is possible of these identified Member States: a) micro island countries, such as Cyprus and Malta with a population below 900,000 and geographical isolation; and b) the remaining countries - former post-communist countries with initially barely any understanding of the principles of market economies. However, the article does not specifically follow this narrow categorisation.

¹² Note: further discussion will be provided in Section VI.

¹³ See, Commission Staff Working Document 'Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues', Accompanying the document, Communication From The Commission To The European Parliament And The Council *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* SWD(2014) 231/2, at p 13.

competition culture in the business community.¹⁴ First of all, it has been necessary to change the mind-set of undertakings, public authorities and consumers to explain the benefits of competition in these countries. For instance, the Competition Council of Lithuania regularly publishes the quantified direct and indirect benefits of competition enforcement to consumers.¹⁵ Secondly, the NCAs of these countries are expected to prove to their governments that they provide value for money in securing the budgets necessary for their functioning and operation. For instance, some of the NCAs of small countries, namely, Croatia identify securing sufficient budget to enhance efficiency in the work of the Croatian Competition Agency as a top priority.¹⁶ Building an impeccable reputation of the NCAs does not happen overnight. Consequently, due to the specific peculiarities attributable to these small 'newer' Member States, they are distinguishable from the other Member States and should be analysed separately.

There are other specific features usually attached to small countries; they are concentrated markets and the inability to exploit economies of scale. Therefore, small countries have a greater stake for openness to trade and maintaining free trade in order to increase the size of their markets.¹⁷ Admittedly, all these 'newer' Member States were eager to join the Internal Market with over 500 million consumers and took steps towards integration even before officially joining the EU via signing the Association Agreements. They all had to establish a functioning market economy with its ability to sustain the competitive pressure from and in the then Single Market and the Economic and Monetary Union, which was one of the pre-accession conditions. On the one hand, the removal of barriers to trade has enabled businesses in these countries to realise economies of scale, especially through expansion into their neighbouring markets. In practice this works if companies are capable and willing to exploit these lucrative opportunities.¹⁸ While penetrating well developed Western markets have been difficult for these small businesses, there have been more successes with their neighbours due to

¹⁴ For instance, in early days much of the NCAs resources in these countries were spent on disseminating information about competition law. Many businessmen at the time considered it to be unfair that other traders are entering their markets and taking their businesses that they had exclusively enjoyed for many years. See, for instance, Experts on Competition Law and Policy, *Roundtable on: Prioritization and resource allocation as a tool for agency effectiveness, Contribution by Malta*, Geneva, 8-10 July 2013. Similar approach was in the Baltic countries, See J. Malinauskaite, *Merger control in post-communist countries*, Routledge, 2010.

¹⁵ The Competition Council of Lithuania, 'Evaluating Work of the Competition Council of the Republic of Lithuania: Direct and Indirect Benefits to Consumers', 2011 and then 2013. Available at: kt.gov.lt/en/info/doc/news_2013-04-10.pdf (accessed on 20 October 2015).

¹⁶ See, M.Liszt, 'Croatia: Overview', the European Antitrust Review 2016, *Global Competition Review*. Available at: <http://globalcompetitionreview.com/reviews/72/sections/243/chapters/2907/croatia-overview/> (accessed on 15 September 2015).

¹⁷ A.Alesina, E.Spolaoze, R.Waeziarg, 'Trade, Growth and the Size of Countries', in P.Aghion and S.N.Durlauf (eds) *Handbook of Economic Growth*, Vol 1B, Elsevier, 2005, Chapter 23.

¹⁸ Anecdotal evidence suggests that businesses in these countries have limited access to capital allowing them to expand into foreign markets. Nevertheless, it seems that the Commission's Capital Markets Union aims to facilitate Member States with the smallest markets to have a better channelling of capital and investment into their projects. See, Press Release, 'Capital Markets Union: an Action Plan to boost business funding and investment financing', 30 September 2015, IP/15/5731.

geographical and cultural proximity. For instance, for Slovak firms the most frequent foreign markets are Czech Republic, Hungary and Poland.¹⁹

On the other hand, the situation has reverse effects: national businesses which were protected from foreign competition, now have to compete with foreign undertakings in their home markets. The Central and Eastern European countries²⁰ have been an important destination for the Union undertakings wishing to expand their businesses to lower-cost locations and utilise skilled local work-forces.²¹ For instance, the Central and Eastern European region in 2013 was the fourth in the world by both the value and number of executed mergers and acquisitions transactions.²² These countries, especially Eastern European countries are also politically motivated to be part of a deeper European integration and to shatter any previous links with the former Soviet Union, especially in the context of the Energy market.²³ Most recent development involves reaching an agreement in October 2015 to facilitate the integration of the gas systems of the Baltic Sea region into the internal EU gas markets in line with the European Commission's energy security strategy to ensure that no region in Europe remains isolated.²⁴

Furthermore, the euro is the most tangible proof of advanced European integration. For instance, price dispersion (i.e. another indicator of economic integration) is much less pronounced in the Euro area than in the EU as a whole.²⁵ All the countries analysed in this paper (save Croatia, which has not met the necessary conditions and it

¹⁹ V.Kaputa, H.Palus, R.Vlosky, 'Barriers for wood processing companies to enter foreign markets: a case study in Slovakia', (2016) 74 European Journal of Wood and Wood Products 109–122.

²⁰ This article employs an OECD term to define Central and Eastern European Countries (CEECs), which comprise of the group of countries, such as Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania.

²¹ A.Mayhew, *Recreating Europe: the European Union's Policy towards Central and Eastern Europe*, Cambridge University press, 1998, at 191

²² Zephyr Annual M&A Report. Global (2013). Available at: www.mandaportal.com/getattachment/8ff3c7f7-7179-45a4-8109-2246d640ddac/Global,-FY-2013 (accessed on 20 April 2016). Apart from M&As, there are other indicators to establish market integration, such as FDI, price index and regulatory data. See, for instance, F.A.Ilzkovitz, et al., 'Steps towards a deeper economic integration: the Internal Market in the 21st century a contribution to the Single Market Review', European Economy, European Commission, Directorate-General for Economic and Financial Affairs, N° 271 January 2007. There is also the EU-25-Index, which determines the individual degree of European integration for each member state of the then EU-25 countries on an annual basis since the enlargement in 2004 based on EU Single Market, EU Homogeneity, EU Symmetry and EU Conformity. Available at: <http://www.eu-index.uni-goettingen.de/?lang=en> (accessed 30 April 2016).

²³ For example, in the Gazprom case the Commission's preliminary investigation suggests that Gazprom is hindering competition in the gas supply markets in eight Member States (*Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia*), the Statement of Objections were sent to Gazprom on 22 April 2015.

²⁴ The European Commission, Press release, 'End of energy isolation in the Baltics: how the Gas Interconnector Poland-Lithuania (GIPL) works', Brussels, 15 October 2015, MEMO/15/5845. Available at: http://europa.eu/rapid/press-release_MEMO-15-5845_en.htm (accessed 25 April 2016).

²⁵ Eurostat, Comparative price levels for food, beverages and tobacco, 2012. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Comparative_price_levels_for_food,_beverages_and_tobacco (accessed 25 April 2016).

is not yet qualified) are part of the Eurozone. Lithuania is the newest country to join the euro in January 2015.

Given that economic integration is a continuum, which varies across different areas (i.e. finance, goods, and services) and over time, this article does not attempt to capture the extent to which national markets of these small ‘newer’ Member States are integrated into the Internal Market. Instead, it makes an assumption that most businesses overstep or will be overstepping national borders in the near future.

III. REGULATION 1/2003 AND ITS IMPACT ON THE NCAs OF SMALL ‘NEWER’ MEMBER STATES

1 May 2004 marked a major development of EU competition law with Regulation 1/2003 coming into force²⁶ and ten new Member States joining the enforcement club with barely any knowledge and experience of market principles. Regulation 1/2003 eradicated an obsolete notification system and established the premises for a more decentralised application of Union competition rules by the NCAs and national courts in addition to the European Commission. The NCAs and national courts, including the newly joined Member States have become key pillars of the application of EU competition law, where Article 3(1) of Regulation 1/2003 has provided not only the possibility but also imposed an obligation on the NCAs of the Member States to apply Articles 101 and 102 TFEU in parallel with their national competition rules when the effect on trade criterion is met. They are obliged to do so whenever trade between Member States is affected in accordance with the procedures set in place by Regulation 1/2003.

This section will explore the underlining basis of Regulation 1/2003 and its impact on the ‘newer’ Member States of small countries, using a SWOT analysis. The SWOT is a useful technique widely used in various mainly business related projects to understand the Strengths, Weaknesses, and identify the Opportunities and potential Threats faced.²⁷ Regulation 1/2003 is discussed in the broader context embracing its supporting documents.²⁸

²⁶ Note: Regulation 139/2004 also came into force on 1 May 2004. However, this paper excludes merger control.

²⁷ These will be looked at from the NCAs’ perspective only. The impact on the European Commission will be excluded.

²⁸ They are Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123 of 27.4.2004, pages 18-24; Commission Notice on cooperation within the network of competition authorities OJ C 101 of 27.4.2004, pages 43-53; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC OJ C 101 of 27.4.2004, pages 54-64; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty OJ C 101 of 27.4.2004, pages 65-77; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) OJ C 101 of 27.4.2004, pages 78-80; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty OJ C 101 of 27.4.2004, pages 81-96; Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27.4.2004, pages 97-118.

As far as the Strengths of Regulation 1/2003 are concerned, it widened the competence of the NCAs and national courts. All the provisions of Articles 101 and 102 TFEU are now capable of producing direct effect which is in line with the principle of subsidiarity bringing a decision to the authority with the best knowledge of national markets. It has also led to broader enforcement scope of EU competition rules. For instance, most EU competition cases are decided by the NCAs with the European Commission focusing on larger pan-European cases.²⁹ Indeed, from 1 May 2004 until 31 December 2012 approximately 88% of all decisions on Articles 101 and 102 TFEU were adopted at national level.³⁰ The NCAs of 'newer' Member States have also become full members of the ECN (the European Competition Network), which was created as a vehicle for the European Commission and the NCAs close co-operation. It has also initiated further co-operation among NCAs, especially with those in the neighbouring markets, for instance, Cyprus and Greece,³¹ Slovenia, Austria and Hungary,³² Finland, Estonia, Latvia, and Lithuania.³³ Along similar lines, Regulation 1/2003 has opened several opportunities for NCAs. First of all, the NCAs are directly involved in the EU competition law enforcement with regular contacts and consultation on enforcement policy with the European Commission enabling the NCAs, especially from 'newer' Member States to better understand the EU framework and policies to ensure their effective and consistent application. Secondly, Regulation 1/2003 and specifically, the ECN, has created a forum for the NCAs to pool their experience and identify best practices on particular issues which could provide guidance to NCAs with regard to their enforcement activities or to their national parliaments for reforming respective legislation.³⁴ Therefore, it can serve as an instrument to promote the convergence of national procedures and sanctions with Regulation 1/2003.

However, "all that glitters is not gold",³⁵ therefore, the Weaknesses of Regulation 1/2003 cannot be ignored. Firstly, Regulation 1/2003 directly intervened in the domestic enforcement of competition law. This meant that these Member States had to undertake further reforms in order to accommodate the changes brought by Regulation

²⁹ See, the statistics provided by the ECN, available at: <http://ec.europa.eu/competition/ecn/statistics.html> (accessed on 20 October 2015).

³⁰ See W. Wils, 'Ten Years of Regulation 1/2003- a Retrospective', presentation at the conference *10 Years of Regulation 1/2003*, Mannheim Centre for Competition and Innovation, 7 June 2013.

³¹ See, the Prioritisation policy proposed by the Commission for the Protection of Competition in Cyprus.

³² See, for example, a recent conference "*Slovenian competition day*" organised by the Slovenian Competition Protection Agency on 17 September 2015 with the aim to bring together competition law experts from European Commission, Competition Authorities from Austria, Hungary and Slovenia as well as representatives of Courts, private sector and academics.

³³ See, for instance, the annual meeting of the representatives from the Baltic and Finnish Competition Authorities – Regional Competition Conference, hosted by the Estonian Competition Authority on 4-5 June 2013. The meeting was designed to focus on actual competition concerns, exchange information about developments and jointly find solutions. On the second day of the conference discussions between case-handlers took place in sectoral working groups. See, ECA, Annual report 2013.

³⁴ M.Kekelekis, "The European Commission Network (ECN): It Does Actually Work Well", EIPASCOPE 2009(1), the study report undertaken by EIPA with the self-assessment of NCAs on the functioning of their own organisations and of the ECN.

³⁵ Shakespeare, from the *Merchant of Venice*.

1/2003. A failure on the part of a Member State to fulfil its obligations under EU law, would mean that the European Commission may launch formal infringement procedures pursuant to Article 258 TFEU. For instance, the European Commission initiated proceedings against Cyprus, where the NCA of Cyprus lacked the power to apply Articles 101 and 102 TFEU, because national law made no provision to this effect.³⁶ A warning was issued against Slovakia due to the limited ability of the NCA to apply either national rules or Articles 101 and 102 TFEU in the telecommunication sector.³⁷ Therefore, Regulation 1/2003 has reduced the scope for national policy choices. Secondly, Regulation 1/2003 has also increased the workload on the NCAs with the implementation and enforcement of EU competition law and policy frequently requiring significant human and budgetary resources; it was often more than these countries could afford. This is because these NCAs also need to have the same basic equipment as NCAs in larger Member States in order to be able to effectively enforce the competition rules. For instance, initially the Competition Protection Office of Slovenia started working with only 4 employees and with a minimum budget. It seems that the European Commission is unwilling to take into account the limited resources of these Member States and once the NCA starts an investigation under Article 13 Regulation 1/2003, it will not release the NCA from its task.³⁸ This hands-off approach may not be sufficient to ensure the functioning of the decentralisation system³⁹ and this in turn may lead to another weakness, such as a failure to secure a uniform application of EU competition law and to promote legal certainty. This is especially important in the context of Article 102 TFEU, where the Member States are free to have stricter national rules. Given that there is also a need to converge some national enforcement rules in line with the EU, this places extra costs on national Member States. For instance, there are several legal obligations stemming from Regulation 1/2003, namely the obligation for the NCAs and national courts to apply Articles 101 and 102 TFEU and the convergence rule for Article 101 TFEU pursuant to Article 3 and the obligation to set up the NCAs with a defined list of the powers enabling them to apply Articles 101 and 102 TFEU.⁴⁰ Furthermore, currently all Member States are under an obligation to implement the Directive on Antitrust Damages Action.⁴¹ Even though there was no such obligation, the ECN members endorsed a Model Leniency Programme⁴² and Recommendation on the power to set priorities⁴³ and committed to use their best

³⁶ See Case *Lumiere TV Public Company Ltd./Multichoice* (national file reference 11.17.14/2006).

³⁷ See the Commission press Release IP/09/200 of 02.02.2009.

³⁸ Case T-201/11 *Si.mobil telekomunikacijske storitve d.d. v European Commission*, [2014]. Further discussion will be provided in Section IV.

³⁹ A more frequent use of Article 11 (6) of Regulation 1/2003.

⁴⁰ Articles 35 and 5 Regulation 1/2003.

⁴¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance OJ L 349, 5.12.2014, p. 1–19

⁴² The ECN Model Leniency Programme, introduced in 2006, has been a major catalyst in encouraging ECN members to introduce leniency programmes and in promoting convergence between them. It was revised in 2012.

⁴³ ECN Recommendation on the Power to Set Priorities, December 2013.

efforts to align their national programmes to these recommendations. The European Commission's most recent call for public consultations on 'Empowering the National Competition Authorities to be more effective Enforcers' suggests that potentially further steps will have to be taken in order to facilitate even further convergence.⁴⁴ Finally, the NCAs have encountered additional costs due to the extra workload in the context of assisting in the investigation of Articles 101 and 102 TFEU to the European Commission and other NCAs.

Finally, as far as the Threats are concerned, the research undertaken by Botta, Svetlicinii and Bernatt prove that the NCAs of 'newer' Member States, including small countries, largely rely on their domestic equivalents instead of Articles 101 and 102 TFEU.⁴⁵ Therefore, this points to under-enforcement of the EU competition law provisions.⁴⁶ Undertakings of these countries may turn to neighbouring countries if they wish for the EU competition law provisions to be enforced, leading to the risk of forum shopping. Other potential threats, such as parallel proceedings are currently unlikely to take place in these countries.⁴⁷

IV. 'SMALLNESS IN COMPETITION LAW' – DOES IT REALLY MATTER?

While the previous sections identified the specific features of small 'newer' Member States of the EU and obligations imposed by the introduction of Regulation 1/2003, this section will further elaborate on whether these features play any role in the context of the application and enforcement of competition law. At the outset, it is useful to recap the limited debates on the application of competition law in small EU Member States,⁴⁸ which mainly centred on the definition of relevant markets, especially in the context of merger control.

Following several merger blockages by the European Commission,⁴⁹ the Nordic countries sparked fierce debates in late 1990s that the methods adopted by the European Commission in defining geographic markets could lead to discrimination

⁴⁴ The European Commission's call for public consultations on 'Empowering the National Competition Authorities to be more effective Enforcers'; the consultation period was from 4 November 2015 to 12 February 2016.

⁴⁵ M. Botta, A. Svetlicinii, M. Bernatt, 'The assessment of the effect on trade by the national competition authorities of the "new" Member States: Another legal partition of the Internal Market?' (2015) 52(5) *Common Market Law Review* 1247–1275.

⁴⁶ Especially so, if the NCAs of smaller Member States rely on the neighbouring NCAs to initiate proceedings.

⁴⁷ For further discussion on the impact of Regulation 1/2003 in New Member States, see KJ. Cseres, 'The Impact of Regulation 1/2003 in the New Member States' (2010) 6(2) *Competition Law Review* 145–182.

⁴⁸ On international level, it seems that 'smallness' has attracted more attention. See, for instance, The ICN studies Special Project for the 8th Annual Conference, *Competition Law in Small Economies*, Prepared by Swiss Competition Commission Israel Antitrust Authority, 2009. There has been contrasting opinions expressed. On the one hand, it has been suggested that the size of the economy has a limited significance in the context of competition law and, instead, relates to the functioning of competition in the domestic market. On the other hand, it has been indicated that the size of the economy should be taken into account up to a certain extent and that the competition rules and their application could be adjusted to peculiarities of a small free market economy.

⁴⁹ See, for instance, the *Volvo/Scania* merger case No. COMP/M. 1672 or *SCA/Metsä Tissue* Case No. IV/M. 2097.

towards small Member States. The allegations were placed on the European Commission due to its approach to prevent undertakings in small countries to merge because they would quickly reach dominance in the national concentrated markets (i.e. concentrated markets are one of the features of small market economies), ignoring the fact that they need to grow in order to compete worldwide.⁵⁰ This criticism was rejected by the European Commission as flawed, sending a clear message that there is:

“no reason to modify competition laws or their application according to the size of the relevant geographic market, and consider[s] as counterproductive and dangerous arguments that competition laws should be diluted or [misapplied] in order to allow ‘national champions’ to develop, regardless of the size of the jurisdiction or market.”⁵¹

Therefore, all Member States, regardless of their size or development level, have an obligation to apply EU competition law uniformly to secure a fair playing field for undertakings.

In contrast, a pioneering piece of work by Professor Gal on competition law in small market economies supports a theory that small market economies⁵² require different competition rules; this is because in small markets there are a limited number of market players and markets can serve only a limited number of players, as a result only a limited number of firms can act effectively in the market. Gal further argues that small size affects competition law from its goals to its rules of thumb and that the countries of small market economies have to tailor their competition law in accordance to their small size. Even though this article excludes substantive issues with regard to the application of the EU competition law provisions, Gal’s defined notion of ‘smallness’ supports further arguments. According to Gal, conventional ‘size’ factors, such as population size are less important. Instead, the focus should be placed on some key elements, such as openness to trade and high concentration levels. Consequently, countries, such as Latvia would not be regarded as ‘small’ due to their openness to trade.⁵³ Thus, building on Gal’s theory it can be argued that national relevant markets in the context of small countries should be evaporating and becoming more integrated in larger neighbouring markets or into the whole of the EU internal market.⁵⁴ This is because there are numerous industries where scale economies exceed the demand of a

⁵⁰ The Nordic countries further expressed that in large Member States such a problem would not arise because undertakings could reach the necessary dimension without approaching the level of dominance.

⁵¹ SPEECH/01/439, Speech by Commissioner Mario Monti, European Commissioner for Competition Policy, ‘Market definition as a cornerstone of EU Competition Policy’ Workshop on Market Definition - Helsinki Fair Centre Helsinki, 5 October 2001.

⁵² Gal, M.S., *Competition policy for small market economies*, New York: Harvard University press, 2003. Specifically, Professor Gal in her book provides three main factors in delineating the characteristics of small market economies, which are population size, population dispersion and openness to trade (at 1-2). Gal’s definition of a small economy mainly focuses on high concentration levels and entry barriers. Also see Competition Policy and Small Economies, OECD, 7 February 2003

⁵³ Gal has this reference to Latvia. See, Competition Policy and Small Economies, OECD, 7 February 2003. The same may not be true for Cyprus and Malta due to their geographic ‘isolation’.

⁵⁴ The reference to the ‘fall of barriers and markets becoming integrated’ was made already by Monti in 2001 referring to the Nordic countries, n 51.

small country. Therefore, most markets in the countries analysed in this paper should be regarded as European rather than national.

Equally, to elevate a matter even further, the main criterion of 'the Effect on Interstate Trade between the Member States' that triggers European instead of national law pursuant to Article 3(1) Regulation 1/2003 is broadly interpreted. In its leading case *Societe Technique Miniere* the CJEU stated that Article 101 TFEU applies to an agreement when it had "an influence, direct or indirect, actual or potential on the patterns of trade between Member States".⁵⁵ In *Windsurfing International* the CJEU ruled that the then intra-Community trade would be affected even though the agreement was limited to the supply of the German market, as the manufacturers were free to sell their sailboards in other EU Member States.⁵⁶ The so called *Societe Technique Miniere* formula was reiterated in more recent cases, such as *ASNEF-EQUIFAX*, where the court stated that an agreement if "capable of affecting trade between Member States, must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".⁵⁷ Similar wording of "indirect" and "potential effect on trade" implying a rather broad interpretation were lately incorporated in the Commission's Notice on the concept of effect on trade.⁵⁸ In addition, the scope of 'appreciability' has been recently widened. In *Expedia*, which led to the revised *De Minimis Notice*,⁵⁹ was held that "an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition".⁶⁰ Therefore, smaller undertakings are not immune from competition law by reason of their small size. Clearly, the current approach employed by the European Commission and the Courts implies that the element of 'effect on trade between Member States' should be easily met in small Member States due to their integrated national markets and therefore, the EU competition law provisions should

⁵⁵ Case 56/65 *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, ECLI:EU:C:1966:38, [1966] ECR 337, at para 38.

⁵⁶ Case 193/83 *Windsurfing International v. Commision*, ECLI:EU:C:1986:75, [1986] ECR 611, at paras 20-22.

⁵⁷ Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, [2006] at para 34.

⁵⁸ Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty OJ C 101, 27.04.2004, p. 81-96. The Notice restated the principles developed by the European Courts and sets out when the impact of agreements on trade between Member States is "appreciable". Agreements are unlikely to appreciably to affect trade between member states if: i) the aggregate market share of the parties on any relevant market in the EU does not exceed 5%; and ii) in the case of horizontal agreements the aggregate annual EU turnover of the parties in the products concerned does not exceed EUR 40 million or, in the case of vertical agreements, the annual EU turnover of the supplier in the product concerned does not exceed EUR 40 million.

⁵⁹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ C 291, 30 August 2014; Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice SWD(2014) 198 final revised on 03/06/2015. *De Minimis* will not apply to agreements containing any restriction "by object" or any of the restrictions that are listed as "hardcore restrictions" in current or future Commission block exemption regulations.

⁶⁰ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, at para 37.

be applied instead or simultaneously with domestic equivalents. Yet, this is not the case. This article will reveal that there are a lower number of cases where Articles 101 and 102 TFEU were directly enforced in some of these ‘newer’ small Member States. However, there is no proof that there is a total under-enforcement of competition law in these jurisdictions. Instead, it seems that the NCAs rely on domestic equivalents.⁶¹

As far as ‘smallness’ in the EU competition enforcement is concerned, there have been some recent references to small countries with the European Commission admitting that “the competition authorities in smaller Member States suffer from limited financial resources or very low staff numbers”.⁶² Yet, it also stressed that the NCAs of these countries must have the same capacity in terms of facilities and personnel as the NCAs in large Member States in order to be able to effectively enforce the EU competition rules. Paradoxically, the European Commission enjoys, *a fortiori*, broad discretion of interpretation of Article 13 Regulation 1/2003, and will reject a complaint even though the NCA may not be well equipped to deal with the case. While upholding the European Commission’s decision the General Court in *Si.mobil* stated that:

“the requirement to ensure the effective application of EU competition rules cannot [...] have the effect of imposing an obligation on the Commission to verify [...] whether the competition authority concerned has the institutional, financial and technical means available to it to enable it to accomplish the task entrusted to it by that regulation”.⁶³

Even though Regulation 1/2003 has introduced full parallel competences of the European Commission and NCAs, it seems that the European Commission is unwilling to relieve the NCA’s duty of its competence pursuant Article 11(6) Regulation 1/2003. Therefore, even if the practice may affect trade between Member States, the undertakings from small countries may struggle to prove the existence of an EU interest and the European Commission can reject a complaint “on the sole ground that the infringement alleged did not have a significant effect on the functioning of the internal market.”⁶⁴

Therefore, the conclusion can be drawn that ‘smallness’ does matter, as at least in theory, small Member States are more exposed to the obligation of enforcement of EU

⁶¹ This conclusion was reached at a recent study conducted by M. Botta, A. Svetlicinii, M. Bernatt, n 45. The author of this article has also reviewed the Annual Reports published by the NCAs of these analysed Member States to support this finding. Unfortunately, not all Member States provide statistical data (i.e. how many cases on domestic equivalents of Articles 101 and 102 TFEU were investigated by the NCAs in these countries) and/or do not make distinction between Articles 101 and 102 TFEU and their domestic equivalents.

⁶² Commission Staff Paper, n 13, at p 8.

⁶³ Case T-201/11 *Si.mobil telekomunikacijske storitve d.d. v European Commission*, ECLI:EU:T:2014:1096 at para 57. In this case the applicant Si.mobil lodged a complaint to the European Commission under Article 102 TFEU for allegedly abusive practices of Mobitel at the retail and wholesale functional levels of competition across a range of mobile communications markets in Slovenia. The Commission rejected the complaint as it was discovered that the NCA has already started investigation in these relevant markets, even though the Chairman of the NCA did not object for the European Commission to investigate the case.

⁶⁴ *Si.mobil*, *ibid*, at para 100. Also see Case T-273/09 *Associazione ‘Giulemanidallajuve’ v Commission*, ECLI:EU:T:2012:129, paras 87 and 110.

competition provisions. It seems that the European Commission is not willing to release the NCAs from this burden as the *Si.mobil* case illustrates. Yet, unfairly, all the NCAs (regardless of their size) must have basic equipment to be able to enforce Articles 101 and 102 TFEU, as the same rules must be applied uniformly across the EU. The following sections will further expand on the challenges faced by these small 'newer' Member States and their competition law enforcement experiences.

V. NATIONAL COMPETITION AUTHORITIES OF SMALL 'NEWER' MEMBER STATES

All competition policy and enforcement systems consist of essentially two components: the legal rules governing substance, competences and procedure, and the administrative structures and processes through which the legal rules are implemented.⁶⁵ All Member States of the EU are free to design their own NCAs. Theoretically, a competition authority should be independent and impartial in order to be free from external influence either from the undertakings they supervise or from the State. Monti, however, argues that authorities cannot do whatever they wish and must be constrained in some ways by the markets (i.e. the NCA cannot overhaul the way markets operate) and by the State (i.e. it provides the NCA with the mandate and budget).⁶⁶ Therefore, independence in this article is analysed in the context of operational independence, where government assigns a NCA a mission, and the NCA is free to implement its mission independently of government and industry.

There are no EU rules providing for minimum guarantees of independence, save the generic requirement in Article 35 of Regulation 1/2003, which only requires that the Member States designate the competition authority responsible for the application of the EU competition rules in such a way that "the provisions of the Regulation are effectively complied with." Given that Regulation 1/2003 does not compel the Member States to adopt a specific institutional framework for the implementation of EU competition rules either,⁶⁷ it is the Member States' responsibility to decide on the structure and organisation of their respective NCAs. The Member States may allocate different powers and functions to the different authorities and they may also decide on the administrative or judicial nature of the authority, subject to the principles of equivalence and effectiveness. Even though the institutional structure of the NCAs varies between Member States, two basic models of institutional design can be identified in the EU.⁶⁸ First of all, the administrative model, where a single administrative authority has exclusive competence to investigate a case and take

⁶⁵ P.Lowe, 'The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition', *Competition Policy Newsletter*, November 2008, Number 3, p 1.

⁶⁶ G.Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network', EUI Department of Law Research Paper No. 2014/01, 2014.

⁶⁷ Article 35 of Regulation 1/2003 provides that "Member States shall designate the competition authority or authorities responsible for the application of Articles [101 and 102 TFEU] in such a way that the provisions of this regulation are effectively complied with".

⁶⁸ The European Union, 'Roundtable on Changes in Institutional Design of Competition Authorities', 17-18 December 2014, DAF/COMP/WD(2014)107. Also see Commission Staff Paper, *Ibid*, fn. 14.

enforcement decisions subject to judicial control. Secondly, the bifurcated judicial model, where an administrative authority carries out the investigation and then brings the case before a court for a decision on substance, sanctions or both.⁶⁹ All small 'newer' Member States analysed in this paper have opted for the administrative model, except Estonia in criminal proceedings. Before the 2011 reforms the NCAs of Malta⁷⁰ operated under the bifurcated judicial model, as the former Office for Fair Competition had an investigative role with decision-making vesting in the Commission for Fair Trading (replaced by the Competition and Consumer Appeals Tribunal). Currently, some Member States, such as Lithuania, apply this model with regard to the sanctions imposed on individuals.⁷¹ The importance of an effective division of investigation and decision-making⁷² has already been discussed with reference to the European Commission. The same arguments apply to enforcement by NCAs. The absence of an institutional division between the authority competent for investigations and the decision-making body seems to lead to some "prosecutorial path dependence", nevertheless, some NCAs have a functional separation between the investigative and decision-making activities of their single administrative institutions,⁷³ which compensate for this shortage. Additionally, the decisions of all NCAs of the analysed Member States are subject to judicial review.

Historically, all NCAs were established well in advance to their accession to the EU around 1990s.⁷⁴ However, their origins are far from similar. Given that former socialist countries had centralised economies with a policy to set and control prices, for instance, the NCAs of some these countries, such as Estonia and Lithuania were re-organised from the Price Authorities. Their previous function to control prices had to change almost overnight into the protection of competitive process. The regulators, who worked under the old system, had to change and adopt a new system while developing their new regulatory skills.⁷⁵ Initially, NCAs of the countries in question had

⁶⁹ The other models can also be identified, where, in addition to the main NCA, other sectoral regulators have competence to apply Articles 101 and 102 TFEU (and domestic equivalents) to the sector for which they are competent. For instance, in the UK there are 9 authorities capable of enforcing the EU competition law provisions.

⁷⁰ In the context of breaches of Articles 101 and 102 TFEU. The Malta Competition and Consumer Affairs Authority Act VI of 2011.

⁷¹ The Law on Competition of Lithuania has an exception with regard to CEOs where only the Vilnius Regional Administrative Court can impose sanctions (i.e. disqualification or a financial penalty) on these individuals. See Article 41(1) of the Law on Competition 23 March 1999 No VIII-1099, (last amended on 22 March 2012 No XI-1937).

⁷² The right to a fair trial and the right of defence are enshrined as general principles of EU law.

⁷³ For instance, in Cyprus the Commission for the Protection of Competition has a decision making power. Whereas the investigative responsibility falls within the Service. In Latvia, any decisions (final and procedural) are taken by Council, whereas investigation is done by divisions of Executive directorate.

⁷⁴ For instance, the Antimonopoly Office of Slovakia was established in 1990. The Monopoly Monitoring Committee, the predecessor of NCA of Latvia and the Agency of Prices and Competition, the predecessor of NCA of Lithuania were established in 1992. The Competition Protection Office of Slovenia was established in 1994.

⁷⁵ V.Nakrosis, 'Assessing Governmental Capacities to Manage European Affairs: The Case of Lithuania'. In V.Pettai and J.Zielionka (eds.) *The Road to the European Union, Estonia, Latvia and Lithuania*, Manchester University press, 2003, at 111

a strong governmental involvement, as they were part of a ministry or fell under the remit of the government's supervision. For instance, the former Monopoly Monitoring Committee of Latvia was part of the Department for the Monitoring of Monopolies and Promotion of Competition under the Ministry of Economic Reform. The Competition Council of Lithuania initially existed within the Agency of Prices and Competition under the Ministry of Economy. This agency and its predecessors lacked formal independence from the government.⁷⁶ The Office for Fair Competition of Malta was a directorate in the Consumer and Competition Division, which fell under the Ministry for Finance, the Economy and Investment. Finally, the Competition Protection Office of Slovenia, which was established in 1994, was organised as an institution within the Ministry of Economy.

All NCAs of these countries have taken the necessary steps to improve a degree of independence. The majority of these countries now have independent Competition Authorities in place without any formal attachments to the Ministries. These include the Croatian Competition Agency (CCA), an independent body, which is accountable for the delivery of its objectives to the Croatian Parliament; the Commission for the Protection of Competition of the Republic of Cyprus (CPC); the Competition Council of the Republic of Lithuania; the Antimonopoly Office of the Slovak Republic (AMO); and the recently reformed Slovenian Competition Protection Agency (CPA).

Even though a few NCAs of these countries are still formally assigned to or come under the responsibility of a ministry, they are free from the government's interference in deciding on individual cases or on the actual application of the law. For instance, although the Latvian Competition Council is a governmental institution of direct administration and it is subordinated to the Ministry of Economics in the form of supervision, the Ministry of Economics does not have the power to influence the investigations and the decisions of the cases taken by the Competition Council of Latvia, which are only reviewable by the court. Similarly, the Malta Competition and Consumer Affairs Authority (MCCAA) falls under the remit of the Department of Industrial and Employment Relations of the recently set up Ministry for Social Dialogue, Consumer Affairs and Civil Liberties,⁷⁷ nevertheless, the Authority is free from any form of interference.⁷⁸

It seems that independence of NCAs is on the EU agenda, as the institutional position of NCAs has been addressed in the framework of European Semester with the aim of ensuring effective competition enforcement across all Member States given their

⁷⁶ In 1995, the Agency was reorganised into two state administrative bodies: the State Competition and Consumer Protection Office, a governmental agency, which had the status of a permanent executive institution and the Competition Council, which acted as a collegial decision making body applying sanctions for violations of competition (while all the preparatory and investigatory work was carried out by the Competition Office). Both institutions were governmental agencies lacking formal independence from the government.

⁷⁷ The Ministry for Social Dialogue, Consumer Affairs and Civil Liberties was established in March 2013.

⁷⁸ The speech delivered by the Hon. Jason Azzopardi, Minister for fair competition, small business and consumers at the conference and training seminar for members of the judiciary on 'EU competition law and its application in Malta' on 13th September 2012, press release reference number PR 1986.

contribution to fostering competition as a growth-enhancing policy.⁷⁹ Priority recently has been given to clear-cut shortcomings in the position of the NCA and their degree of independence. For instance, due to calls for greater independence following country specific recommendations, the former Competition Protection Office of Slovenia, a functionally independent authority, organised within the Ministry of Economic Development and Technology was transferred into an independent public agency – the Slovenian Competition Protection Agency (CPA) in January 2013. Most recent institutional development occurred in Estonia, from 1 September 2015 the Estonian Competition Authority (ECA) moved from the remit of the Ministry of Economic Affairs and Communications to the area of government of the Ministry of Justice in order to increase the independence of the Authority's performance of its tasks.

VI. LIMITED FINANCIAL AND HUMAN RESOURCES: POLICIES IN PLACE TO OVERCOME 'SMALLNESS'

In the current budgetary and economic context, reforms of the competition enforcement framework in the Member States may impact on financial and human resources. All Member States are responsible for ensuring that their competition authorities are adequately equipped for their duties and able to act under suitable conditions for the execution of their tasks. However, there are no explicit requirements in Regulation 1/2003 with regard to the settings of NCAs as discussed in the previous section, which explicitly oblige the Member States to grant sufficient resources to their NCAs. Given that all NCAs of small 'newer' Member States are funded from the state budget, to run an effective authority requires political will and an ongoing commitment from the government. Table 2 reveals limited financial and human resources of the NCAs of these small 'newer' Member States. It should be noted that due to the institutional reforms some NCAs have moved from a single function authority to an integrated multi-functional authority, therefore, the number of personnel has increased. For instance, the Competition Board of Estonia before its reorganisation was down to 12 members of staff,⁸⁰ with the concerns being expressed it may affect the effectiveness of competition law enforcement in Estonia. Similarly, Malta has also increased its intake of personnel due to its newly integrated enlarged authority, but the Office for Competition is the smallest of all four entities. Yet, despite these institutional swellings, the budgets of these NCAs are still very small. For instance, the annual budget of the CMA (the UK's Competition and Markets Authority) is about £65 million, referring to 20 times larger budget than in most of these countries.

⁷⁹ Commission Staff Paper, n 13, at p. 12.

⁸⁰ J. Poldroos, Head of Supervisory Department, 'Latest Developments in Competition Supervision', the paper presented during the conference 'The New Competition Authority – New Challenges' held in Tallinn, 11 November 2008. Also see, ECA, Annual Report of Estonia, 2008.

Table 2. Resources of the NCAs in small 'newer' Member States

Member State	NCA budget for 2013/2014	Personnel
Croatia	13.1 mil Kuna (in 2013)=EUR 1.7mil	51 (10 support staff)
Cyprus	x	24
Estonia	EUR 2 mil	49 (18 in Competition division)
Latvia	EUR 1.06 mil	35
Lithuania	EUR 1.6 mil	72 (25 support staff)
Malta	EUR 3.5 mil (in 2013)	120 (46 support staff)
Slovakia	EUR 2 mil	55 (18 support staff)
Slovenia	EUR 1.25 mil (in 2013)	27 (2 support staff)

(x – information was not available) (various sources were used to obtain this information, including the Annual Reports published by the NCAs)

Given that limited resources may affect effectiveness of EU competition enforcement, the competition enforcement regimes have been strengthened in several Member States in the framework of the Memorandum of Understanding of Specific Economic Policy Conditionality (MoU) with the Member States benefiting from a financial-assistance programme. Surprisingly, no such assistance has been offered to the analysed countries.⁸¹

This section will further explore how the NCAs of the small 'newer' Member States address their limited resources. Two main policies will be identified that are in place in these jurisdictions to overcome their 'smallness'. They are i) changes to the institutional setting through joining competition authorities with other regulatory agencies; and ii) prioritisation policies, allowing the NCAs to focus on severe anti-competitive cases instead of following on all meritless complaints. Additionally, other enforcement tools, such as commitment decisions,⁸² have also been recently introduced in these countries to save limited resources on extensive investigations, as an NCA drops the case in exchange for a commitment from the undertaking under investigation to implement measures to stop its presumed anti-competitive behaviour.⁸³ While this currently

⁸¹ Note: the institutional reforms in Slovenia were initiated following country specific recommendations in the framework of the European Semester.

⁸² For a general discussion on commitment decisions, see N. Dunne, 'Commitment decisions in EU competition law', (2014) 10(2) *Journal of Competition Law & Economics* 399-444.

⁸³ For instance, the amendment to the Competition Act in 2013 in Estonia allows the Competition Authority to accept commitments. In 2014 commitment decisions were issued in two cases AS Tallinna Kute and AS G4S. See the Estonian Annual Report of 2014. In Lithuania the Competition Council accepted commitments by five producers/suppliers of pharmaceutical products and three distributors in 2011 to guarantee that the prices and other conditions for the supply of pharmaceuticals to be resold through public

limited practice⁸⁴ may spare some resources, it is not without costs: they barely provide any guidance on the interpretation and application of the law, which is especially important for the ‘newer’ Member States with a little experience of competition law. Given that commitments are voluntary and normally are not subject to judicial review, this may also stop further development of the law.⁸⁵

i). Integrated institutional settings

Given limited budgetary resources of these small ‘newer’ Member States, governments quite often look for cost-saving options. There exist many different institutional models and find the optimal institutional design is a complex matter. Many jurisdictions have found success with very different designs and what works well in one jurisdiction may not always work well in another. Against this backdrop, many Member States have created “multi-function” agencies by merging the competition authority with the authorities responsible for other economic policy functions, such as consumer protection, sector regulation, technical regulation control or public procurement control. The governments of the analysed small ‘newer’ Member States have also been experimenting with their institutional settings.

The best example of this institutional experimentation is Estonia. In response to the economic slowdown in January 2008 the Estonian Competition Board merged with the former regulators into a single Estonian Competition Authority (ECA), consisting of a Competition Division, Railway and Energy Regulatory Division and Communications Division. The intention behind this transformation was to pull together the experience and synergies of the regulatory bodies in relation to common tasks, to strengthen state supervision, and to make better use of the limited resources of a small country.⁸⁶ In 2012, following a rather unorthodox goal to avoid setting up new regulators,⁸⁷ the ECA was granted additional competences concerning the supervision of the aviation sector with the new tasks being absorbed by the Railway and Communications Regulatory Division, which was re-named into the Communications Regulatory Division (to reflect

tenders are decided independently by the distributor itself. The investigation was carried out under Article 101 TFEU and its domestic equivalent. Given that no factual data on the existence of resale price maintenance was found, the Competition Council decided to terminate the investigation subject to the commitments offered by the undertakings in question. Resolution of 21 July 2011. Interestingly, the G4S commitments in Lithuania were rejected and an infringement decision was reissued. See S.Keserauskas, ‘Lithuania: Competition Council’, the European Antitrust Review 2016, *Global Competition Review*.

⁸⁴ All the analysed NCAs in this paper have the power to adopt commitment decisions (in accordance with Article 9 Regulation 1/2003). See ECN Working Group on Cooperation Issues, Results of the questionnaire on the reform of Member States national competition laws after EC Regulation No. 1/2003, 22 May 2013. Available at: <http://ec.europa.eu/competition/ecn/documents.html> (accessed 1 October 2015).

⁸⁵ For instance, due to the fact that merger cases have barely been tested in court, there was slow progress of merger control development in Lithuania.

⁸⁶ See, ECA, Annual Report of Estonia 2007. Available at: <http://www.konkurenciamet.ee/?id=11591> (accessed 1 October 2015).

⁸⁷ Roundtable on Changes in Institutional Design of Competition Authorities, Note by Estonia, 17-18 December 2014, DAF/COMP/WD(2014)91

the primary subject of its current activities).⁸⁸ In 2014 further development took place when the Communications Regulatory Division was transferred to the Technical Regulatory Authority due to its previous complex division of competences between two authorities: the Competition Authority and Regulatory Authority. The ECA is currently a multi-purpose agency with antitrust⁸⁹ and regulatory functions, in the fields of fuel and energy, postal services, railway, water supply and aviation on the basis and to the extent prescribed by law.⁹⁰ Surprisingly, merging its competition authority with the consumer protection agency was not taken seriously in Estonia due to the belief that “application of consumer protection legislation was much too dissimilar compared to the functions of economic and competition regulators”.⁹¹

It seems that Malta has followed these footprints in order to rationalise their resources as well. The new NCA of Malta – the Competition and Consumer Affairs Authority (MCCAA) which was established on 23 May 2011, and incorporated the Market Surveillance Directorate and Technical Regulation Division. In contrast to Estonia, the MCCAA also embrace consumer protection. Hence, there are currently four divisions within the MCCAA: the Office for Competition; the Office for Consumer Affairs; the Technical Regulations Division; and, the Standards and Metrology Institute. The ‘multi-functionality’ to a lesser extent is also reflected in the NCAs of other Member States. For instance, the Competition Council of Latvia in addition to the enforcement of competition law (excluding State Aid)⁹² is also responsible for abuse of significant market power regulation in the food and non-food retail sectors *vis-à-vis* suppliers (dominant position in retail trade), and Law on Advertising.⁹³ Along similar lines, the Competition Council of Lithuania also carries out functions assigned by other laws, such as the Law on Prices, Law on the Railway Transport Sector Reform, Law on Prohibition of Unfair Practices of Retail Undertakings, Law on Advertising and Law on Prohibition of Unfair Business-to-Consumer Commercial Practices.⁹⁴ The Competition Council of Lithuania also deals with State Aid.

It seems that not all NCAs of small ‘newer’ Member States follow this integration trend. For instance, the Commission for the Protection of Competition of Cyprus, the Croatian Competition Agency,⁹⁵ and the Antimonopoly Office of the Slovak Republic are single function authorities with their focus on the enforcement and further

⁸⁸ See, ECA, Annual Report of Estonia, 2012. Available at: <http://www.konkurentsiamet.ee/?id=11591> (accessed 1 October 2015).

⁸⁹ State Aid falls under the Ministry of Finance in Estonia.

⁹⁰ Roundtable Discussion, Ibid, fn.87.

⁹¹ ID, fn.87, at p.4

⁹² State Aid falls under the Ministry of Finance in Latvia.

⁹³ The Official web-site of the Competition Council of Latvia, available at: <http://www.kp.gov.lv/en/about-competition-council/aim-tasks> (accessed 20 October 2015).

⁹⁴ The main powers Competences and Powers of the Council under the Lithuanian Law, the Council official website, available at: http://kt.gov.lt/en/index.php?show=contacts&con_menu=compet (accessed 20 October 2015).

⁹⁵ State aid in Croatia from the Agency was transferred in the hands of Ministry of Finance in April 2014.

development of the competition provisions, excluding State Aid.⁹⁶ Along similar lines, the Slovenian Competition Protection Agency has competence to enforce all the provisions of competition law, including State Aid.

The institutional settings of the NCAs of the analysed countries varies largely – from single function authorities (in countries, such as Croatia, Cyprus, Slovakia and Slovenia), to bi-functional authorities, such as in Latvia and Lithuania, and finally, multi-function authorities in Estonia and Malta. It appears that the governments of some Member States have been more active than others in order to address their limited resources. Apart from cost savings, there are several benefits distilled from the experience of integrated institutional designs, including from Estonia. First of all, by pooling together sector-specific and competition knowledge, expertise and experience, this enables a multi-functional authority to carry out analysis more efficiently.⁹⁷ Given that a multi-disciplinary team works together and the same decision body overlooks the work of different departments, reinforces coherence and ensures the soundness of decisions. Secondly, consumers may benefit from having a more powerful regulator, acting on their behalf with strong powers to ensure that markets are working efficiently. Finally, the model of integrating competition and regulatory authorities simplifies the regulatory landscape that is more appropriate for these countries' small size, potentially increasing competition in regulated sectors (furthering liberalisation),⁹⁸ securing greater stability and consistency in regulatory decisions. Even though the European Commission follows whether such amalgamation of competences does not lead to a weakening of competition enforcement, merging authorities is part of a Member State's discretion and they are free to experiment in order to discover the most suitable model for them.

ii). Prioritisation policies

The process of prioritisation enables the NCAs to concentrate their limited resources in specific areas identified as being of greatest importance, thus, increasing efficiency in their functioning and operation. Given that competition law is applicable to all sectors of the economy, investigations of suspected infringements of competition law may be extensive in scope and may involve complex analyses. By prioritising their enforcement actions, the NCAs are able to make more effective use of their limited resources, which is especially important for small Member States due to their limited NCAs budgets. Yet, this has not always been the case. Many 'newer' Member States were bound by the legality principle which entails a legal duty to consider all complaints formally filed.⁹⁹

⁹⁶ From 24 April 2014 all former responsibilities and activities of the CCA in the area of State aid in Croatia fall under the competence of the Ministry of Finance. Available at: <http://www.aztn.hr/en/cases/> (accessed 22 October 2015).

⁹⁷ For instance, a recent case in Estonia in the district heating sector concerning AS Tallinna Küte is an example of synergy between the work of Competition Division and Energy and Water Regulatory Division. See ECA, Annual Report of Estonia, 2014.

⁹⁸ JMM Quemada, Chairman of the National Commission for Markets and Competition, 'Spain: National Authority for Markets and Competition', *The European Antitrust Review 2016*, Global Competition Review.

⁹⁹ For instance, the NCAs of Latvia, Lithuania, and Malta had an obligation to act upon any complaint.

However, there have recently been some developments in this field. A dynamic in this area especially intensified after the ECN endorsed a recommendation in 2013 on the power to set priorities, which identified a need for further convergence on the ability of the authorities to set priorities when choosing which cases to pursue.¹⁰⁰

Unsurprisingly, many small 'newer' Member States have recently introduced prioritisation policies in their jurisdictions. Prioritisation policies are not uniform across jurisdictions, as they are meant to be designed to address the NCAs' powers and functions as set out in the law and the environment in which the authorities operate.¹⁰¹ In their prioritisation policies the NCAs of these Member States define some basic objectives, which vary across the Member States. For instance, the Competition Council of Lithuania, which was empowered to set its own priorities and published the Rules on the prioritisation of cases in 2012,¹⁰² proclaims that effective competition and consumer welfare are the two main goals to be achieved.¹⁰³ Similarly, Latvia, which developed and published Case prioritization strategy in 2014 is focusing on two main categories: protection of competition and development of the competition culture;¹⁰⁴ whereas, Malta and Slovakia seem to centre solely on consumer welfare. Priorities are not set in stone and do change to reflect the market conditions.

Short-term and long-term priorities can be identified. Most NCAs rely on a set of generally broad and/or non-exhaustive prioritisation criteria for long term strategies. For instance, the Competition Council of Lithuania assesses enforcement priority based on three principles: i) the expected impact of its intervention on effective competition and consumer welfare; ii) the intervention's strategic importance; and iii) the rational use of resources (the resources needed are compared to the expected success of the intervention). Similar criteria are set by the AMO in Slovakia¹⁰⁵ and MCCA by Malta.¹⁰⁶ A range of rather broad criteria are defined in competition law of Cyprus,

¹⁰⁰ ECN Recommendation On the Power to Set Priorities, December 2013

¹⁰¹ H. Jennings, 'Prioritisation in Antitrust Enforcement – a Finger in Many Pies', *Competition Law International* 11(1) 1 April 2015

¹⁰² Resolution No. 1S-89 'Concerning Priority of the Activities of the Lithuanian Competition Council' (Resolution of Priority) on 2 July 2012

¹⁰³ The Competition Council of Lithuania further defines that that the most severe, negative effects on effective competition and consumer welfare are usually caused by actions that (i) directly affect prices of goods, their quality and variety; (ii) directly limit the possibility of the undertakings to act in the relevant market by closing or partitioning market or through expulsion from the market; (iii) directly affect the relevant part of the undertakings or consumers operating in Lithuania; (iv) directly related with goods intended for consumers. Resolution No. 1S-89 'Concerning Priority of the Activities of the Lithuanian Competition.

¹⁰⁴ The Competition Council of Latvia, Annual Report of Latvia, 2014.

¹⁰⁵ The AMO of Slovakia identifies four criteria: i) gravity of an infringement; 2) importance of an investigation (which also refer to 'end consumer'); 3) probability of success; and finally 4) strategic nature (in case the above criteria are not met, the AMO may still decide to deal with the case provided the set conditions are met). See, Its latest guidelines *Prioritisation Policy of the AMO SR*, 2015

¹⁰⁶ Article 15 of the Malta Competition and Consumer Affairs Authority Act provides: (1) The Office for Competition may allocate different degrees of priority to the cases brought or pending before it and in doing so it shall take into consideration, *inter alia*, the following factors: (a) the degree of consumer harm resulting from the alleged or suspected infringement; (b) the extent of consumer benefit resulting from the intervention of the Office for Competition; (c) the nature and gravity of the alleged or suspected

which provides that the CPC of Cyprus shall take into account the public interest, the effects on competition and consumers, the strategic significance of a case for the CPC, the human resources available and any time frames applicable.¹⁰⁷ In addition, some Member States, such as Malta and Slovakia will also prioritise the promotion of different ways of solving competition issues. Namely, whether an administrative proceeding by the NCA is the most effective way to deal with competition restriction or, instead, preference should be given to competition advocacy or sectoral inquiries. A good example of this choice is the Maltese School Uniforms market study, where the authority has chosen to use advocacy to pre-empt situations restricting competition and to rapidly increase the public's awareness of the problem.¹⁰⁸

With regard to the short-term, it seems that the majority of the NCAs of these countries in addition to more traditional priorities of combating cartels and bid rigging in public procurement,¹⁰⁹ circumscribe to measures aimed at raising public awareness and education, as well as ensuring quality participation of the organisation in international competition protection programs and networks.¹¹⁰ Other NCAs, such as Cyprus, refer to the promotion of cooperation with the neighbouring authorities, which is especially important for these small jurisdictions, as most businesses in these countries cross borders.¹¹¹ In contrast to the Member States discussed above, prioritisation policy is less transparent in Estonia. This is most likely due to its integrated Competition Authority, where prioritisation can be complex given that the authority is also overlooking various sectors.

In some Member States the NCAs decisions either not to initiate investigations or the rejection of non-priority complaints may be appealable in national courts.¹¹² Even

infringement; (d) the stage of investigation; (e) whether the alleged practices are still ongoing or whether harmful effects persist; and (f) whether the alleged unlawful conduct is being examined or can be better examined by another public authority under its regulatory regime.

¹⁰⁷ Cyprus: Amendments to Protection of Competition Law enter into Force (the Protection of Competition (Amendment) Law 2014 (Law No. 41(1)/2014)), ECN Briefs, 2014. Available at: ec.europa.eu/competition/ecn/brief/02_2014/cy.pdf (accessed on 27 October 2015).

¹⁰⁸ The problem was that in the majority of cases, schools had exclusivity arrangements with particular suppliers. Schools were coming up with particular features for their uniforms making the school uniform very specific to the school. Therefore, it was difficult for the parents to match the uniform or parts thereof and purchase from a supplier other than that indicated by the school. The report was published in May 2012. See the MMCCA Annual Report of 2011-2012. For further discussion, see Intergovernmental Group of Experts on Competition Law and Policy, *Roundtable on: Prioritization and resource allocation as a tool for agency effectiveness, Contribution by Malta*, Geneva, 8-10 July 2013

¹⁰⁹ Identified as priorities in Latvia, Lithuania, and Slovakia.

¹¹⁰ Defined by the Competition Council of Latvia. See Annual Report of 2014.

¹¹¹ "As a matter of policy priorities for the coming period, the CPC points out the need to: enhance its advocacy role and promote competition culture and compliance with competition rules in Cyprus; promote its cooperation with the Hellenic Competition Authority, particularly in terms of knowledge and experience exchange; and continue its market monitoring for any impediments or restrictions of competition in crucial sectors of the economy". See L. Christodoulou, 'Cyprus: Commission for the Protection of Competition', in GCR, *The European Antitrust Review 2016* (GCR, 2016).

¹¹² For instance, Article 32 of the Law on Competition in Lithuania, 23 March 1999 No VIII-1099, (last amended on 22 March 2012 No XI-1937). The ECN and its recommendation suggests that jurisdictions using informal means of closure or rejection mostly do not foresee a right of appeal for complainants. In

though the Competition Council of Lithuania is able to refuse to investigate cases or close ongoing investigations, these can be challenged in its courts. It seems that so far the courts are willing to employ a 'stand back' approach. For instance, the Supreme Administrative Court of Lithuania upheld two Council's decisions not to open an investigation in 2014.

It seems safe to conclude that the NCAs of the analysed countries (except Estonia) have introduced prioritisation policies to address their limited resources. Apart from traditional priorities of combating cartels and bid rigging in public procurement, these countries have their unique priorities, such as raising public awareness and building competition culture. Finally, the prioritisation policies further support the recurring theme in this article that small countries are more exposed to the EU law enforcement, as the majority of great importance cases will have 'effect on trade between the Member States'. For instance, this trend is noticeable in Lithuania; since the introduction of prioritisation,¹¹³ during the period of 2012 and 2014 out of six cases only one case was decided solely on national law.¹¹⁴

VII. ENFORCEMENT OF EU COMPETITION LAW BY 'NEWER' SMALL MEMBER STATES AND CHALLENGES FACED

Without any transitional period from the 1st day of joining the EU, all these small 'newer' Member States have an obligation to directly enforce Articles 101 and 102 TFEU in their jurisdictions once the element of 'the Effect on Interstate Trade between the Member States' is triggered. Table 3 reveals that despite its small size Slovenia had dealt with the most cases involving Articles 101 and 102 TFEU during the analysed period from 1 May 2004 to 31 March 2015. Even though these 'newer' small Member States are less privileged as discussed in the previous sections,¹¹⁵ the statistical data in Table 3 uncovers that the number of cases involving Articles 101 and 102 TFEU of the small 'newer' Member States are comparable with the small pre-2004 accession Member States.¹¹⁶ For instance, both Cyprus and Luxembourg had an almost identical number of cases (14 as far as new investigations are concerned, and 6 and 5 respectively under Article 11(4) Regulation 1/2003). Along similar lines, Slovakia had a very similar number of reported cases with other comparable countries, such as

this respect, they rely on the concept that the NCA acts predominantly in the public interest and that the legal framework generally provides sufficient means to complainants to seek recourse against infringers of competition law before national courts. ECN Recommendation On the Power to Set Priorities, December 2013.

¹¹³ Resolution No. 1S-89 'Concerning Priority of the Activities of the Lithuanian Competition Council' (Resolution of Priority) on 2 July 2012.

¹¹⁴ See Competition Council of Lithuania, Annual Reports of 2012, 2013, and 2014. Most recent Annual Reports of other Member States, such as Malta, do not seem to distinguish between Articles 101 and 102 TFEU and their domestic equivalents.

¹¹⁵ See section II. The author supports the theory on a gradual competition culture development. A.Mateus, 'Why should National Competition Authorities be independent and how should they be accountable?' (2007) 3(1) *European Competition Journal* 17-30.

¹¹⁶ Table 4.

Finland.¹¹⁷ Ireland, one of the ‘older’ small Member States, on the other hand, reported a smaller number of cases than Latvia, Lithuania, Slovakia and Slovenia. The lowest number of cases was reported in Estonia, Malta, and Croatia (which most recently joined the EU on 1 July 2013), which will be further explored in the following sections.

Table 3. Enforcement Articles 101 and 102 TFEU by the post-2004 accession Member States (1st May 2004 – 31st March 2015)

Member State	New investigations	Cases (Article 11(4) Reg. 1/2003)
Croatia	3	0
Cyprus	14	6
Estonia	8	3
Latvia	19	6
Lithuania	22	20
Malta	5	3
Slovakia	29	17
Slovenia	31	28

(source the ECN website: <http://ec.europa.eu/competition/ecn/statistics.html>)

Table 4. Enforcement Articles 101 and 102 TFEU by the pre-2004 accession Member States (1st May 2004 – 31st March 2015)

Member State	New investigations	Cases (Article 11(4) Reg. 1/2003)
Denmark	77	46
Finland	29	11
Ireland	18	2
Luxembourg	14	5

(source the ECN website: <http://ec.europa.eu/competition/ecn/statistics.html>)

Given that, theoretically, small countries are more exposed to EU competition law provisions as discussed in Section IV, one may wonder whether there should have been a higher number of cases initiated in these countries based on Articles 101 and 102 TFEU. For instance, Botta, Svetlicinii and Bernatt, whose study focused on all ‘newer’ Member States, including small Member States, argue that they seem to have a narrow interpretation of the criterion of effect on trade in contrast to the European

¹¹⁷ Denmark in this case is an exception, as it reported the largest amount of cases, similar to large Member States, such as the UK.

Commission and Union case-law.¹¹⁸ This is probably the case in some Member States. Yet, to make a certain conclusion it would have been necessary to conduct in-depth empirical research and analyse borderline or national cases with a potential cross-border element in all 'newer' Member States. For instance, in Lithuania potential effects on trade between Member States were considered in the frozen bakery case,¹¹⁹ where the Council found that the food retail chain MAXIMA LT and frozen bakery producer Mantinga had been engaged in RPM (Resale Price Maintenance) for a decade within the territory of Lithuania and therefore infringed Article 101 TFEU and its domestic equivalent. Even though the parties in question argued that the 'actual' effects on trade between Member States were not proven, the Council decided that there was sufficient to establish the 'potential' effects on trade between Member States given the price list was set by the market leader food retailer that might have affected other foreign undertakings.¹²⁰

Therefore, in order to avoid any generalisation, this article evaluates an overall capacity of the NCAs of these small 'newer' Member States and other factors that might have had ramifications on the enforcement of the EU competition law provisions. Therefore, this section will articulate on the challenges faced by the NCAs of small 'newer' Member States from a broader perspective embracing on limited enforcement competences of the NCAs, complex institutional and enforcement frameworks, and judicial review obstruction.

(i). Limited enforcement competences of NCAs of small 'newer' Member States

While Regulation 1/2003 refrains from imposing any specific requirements concerning the NCAs, nevertheless, the limited case law of the CJEU on this general provision suggests that it may require granting powers to the NCAs which were ruled out (or not foreseen) by the legislator.¹²¹ Initially, some NCAs of the analysed Member States lacked competence to enforce the EU competition provisions. For instance, the competences and powers of the Commission for the Protection of Competition of the Republic of Cyprus were enhanced and extended to accommodate the requirements pursuant to Regulation 1/2003 only after the European Commission initiated the proceedings against Cyprus due to its NCA lacking power to apply Articles 101 and 102 TFEU.¹²² Furthermore, as from 2008, the members of the Commission for the Protection of Competition have been appointed on a full-time basis. Therefore, the enforcement of the EU competition provisions has started in Cyprus only from April 2008 when the new legislation on the Protection of Competition Law came into force.¹²³

¹¹⁸ This finding was delivered by Botta, Svetlicinii and Bernatt, n 45.

¹¹⁹ Decision No. 2S-14/2014

¹²⁰ See paras 377-383, Decision No. 2S-14/2014. In addition, UAB Mantinga exports about 50% of its production abroad. UAB MAXIMA LT belongs to a larger international group, consisting of food retail undertakings active in Latvia, Estonia, Bulgaria and Poland.

¹²¹ See, for instance, Case C-439/08, *VEBIC*, ECLI:EU:C:2010:739, [2010] ECR I-2471

¹²² Case *Lumiere TV Public Company Ltd./Multichoice* (national file reference 11.17.14/2006).

¹²³ Law No. 13(I)/2008

Similarly, the Competition Act of Slovakia until its amendment of June 2009 included a disputable provision which restrained the AMO's powers in some sectors, which was challenged by the European Commission.¹²⁴ The European Commission formally requested the Slovak Republic to amend a provision of the Slovak Competition Act that limits the Slovak NCA's power to apply Articles 101 and 102 TFEU to anticompetitive behaviour in the electronic communications, energy and postal sectors.¹²⁵ Despite the limited scope of the Slovak Competition Law, it seems that the enforcement of the EU competition law provisions was not really affected. Out of all the analysed Member States in this paper, Slovakia has reported the most EU cases after Slovenia.¹²⁶

Given that all Member States had to meet the defined criteria before joining the EU, the EU conditionality impelled the Croatian authorities to accept many reforms.¹²⁷ One of the demands initiated by the European Commission was to widen the competence of the Croatian Competition Authority in the banking sector. Initially, the Croatian National Bank oversaw competition law enforcement in this sector. The enforcement of competition provisions in the banking sector was handed to the NCA before Croatia joined the EU in July 2013.

(ii).Complex institutional and enforcement frameworks

Originally, some of the NCAs of small 'newer' Member States had difficulties with their limited enforcement powers to handle investigations, reach decisions and impose persuasive fines. Given the scarce enforcement record of Articles 101 and 102 TFEU in some small 'newer' Member States, this sub-section will focus on three Member States with the lowest number of reported EU cases, namely Malta, Estonia, and Croatia. It will elaborate on the challenges faced in these Member States to enforce EU competition law and any reforms taking place to rectify them. Even though it is too early to canvass the Croatian's EU competition law enforcement due to its recent accession in the EU, nevertheless, its readiness to apply Articles 101 and 102 TFEU can be assessed.

Table 3 proves that Malta has reported the lowest number of cases involving Articles 101 and 102 TFEU (save Croatia). The main cause of this is Malta's struggle with its institutional settings and the division of enforcement power. Initially, the Office for Fair Competition, the former NCA of Malta¹²⁸ had an investigative role and could issue non-binding decisions, whereas a decision-making vested in the Commission for Fair Trading (a specialised Tribunal, currently called the Competition and Consumer Appeals Tribunal). While the competences of the Office for Fair Competition were

¹²⁴ A.Orsulova and D.Raus, *Competition Law in Slovak Republic*, Wolters Kluwer, 2011, at p.67

¹²⁵ See the Commission press Release IP/09/200 of 02.02.2009.

¹²⁶ See Table 3.

¹²⁷ Vrcek argues that the scope of EU conditionality for Croatia has been more stringent than for previous East European states. See, B.Vrcek, 'Croatia as the 28th EU Member State: Impact on Competition Policy' AAI Working Paper No. 13-04, 23 August 2013.

¹²⁸ In the context of breaches of Articles 101 and 102 TFEU. The Malta Competition and Consumer Affairs Authority Act VI of 2011.

expanded in 2004 allocating minor breaches, only the 2011 Law amendments conferred full powers on the Office for Competition (which was renamed), to decide cases including infringements of Articles 101 and 102 TFEU and impose administrative fines, alongside the power to investigate, whilst providing for a right of appeal on points of law and fact to a specialised Tribunal and a right of appeal on points of law only from the decision of the Tribunal to the Court of Appeal. Even though a bifurcated model may work for some Member States, it was not effective in Malta, as a case investigated by the Office for Fair Competition had to be proven afresh before the Commission. Therefore, it prolonged the proceedings and slowed competition law enforcement. The recent 2011 reforms instigated a move from a bifurcated model into an integrated authority which has led to a case being concluded more rapidly: once the Office has concluded its investigation and the parties have been given the opportunity to be heard, the Director General can immediately issue a decision.¹²⁹ There has been another significant development in Malta in order to improve its enforcement of competition law. While some Member States in the EU have opted for criminal law in order to combat restrictive practices more efficiently, Malta has recently substituted its criminal sanctions with administrative fines. This is because criminal sanctions prior to 2012 endured the need of fresh proceedings being brought before the Court of Magistrates with a different burden of proof. This complex system in practice meant that no criminal proceedings were ever instituted and no fines were imposed notwithstanding the decisions finding infringements of competition law.¹³⁰ Accordingly, these new developments should increase the deterrent effect of the law and improve the authority's effectiveness in its enforcement.

Estonia, by contrast, is known for its font of criminal law in competition law and was one of the first countries in Europe to criminalise such behaviour.¹³¹ It can be argued that criminal law in Estonia was introduced for two main reasons. First of all, the nature of penal law in Estonia is rather atypical due to the impossibility to efficiently sanction persons other than criminal proceedings.¹³² Secondly, it can be speculated that criminal offence was also introduced to secure effective enforcement of competition law: to raise the awareness of the importance of competition law and to strengthen its position, as non-compliance 'will be taken seriously'. Generally speaking, Estonia employs a complex diversified procedural framework of competition law enforcement.¹³³ This is because its public enforcement of competition law can be pursued through different channels: 1) administrative; 2) misdemeanour,¹³⁴ or 3)

¹²⁹ S.A.Zahra, 'An Update on the Application of EU Competition Law in Malta', *EU Competition Law and its Application in Malta*, Training of National Judges in EU Competition Law 13 -14 September 2012.

¹³⁰ Intergovernmental Group of Experts on Competition Law and Policy, *Roundtable on: Prioritization and resource allocation as a tool for agency effectiveness, Contribution by Malta*, Geneva, 8-10 July 2013

¹³¹ It introduced criminal offense in 2002. See ECA, Annual Report of Estonia, 2014.

¹³² The ECA, Annual Report of Estonia, 2014.

¹³³ See, Botta, Svetilicini and Bernatt, n 45, at 1261.

¹³⁴ These infringements are prosecuted under the Code of Misdemeanour Procedure and include abuse of a dominant position; implementing a concentration without clearance; and failure to perform its obligations by an undertaking in control of an essential facility. See, Code of Misdemeanour Procedure, passed 22.05.2002, (RT1 I 2002, 50, 313).

criminal proceedings by the NCA or by the public prosecutors through courts. Criminal proceedings follow a complex three-tier system embracing the Competition Authority, the Prosecutor's Office and the Estonian Court System, which also encompasses three levels, such as the Court of First Instance, the Court of Second Instance and the Supreme Court.¹³⁵ All three tiers of Estonian enforcement authorities have different investigative and decision-making powers.¹³⁶ For instance, the Competition Authority has investigative power in administrative proceedings, whereas the Prosecutor's Office has significantly greater investigative powers in criminal proceedings, as it can inspect private homes and cars; it also has the right to use certain means of surveillance, e.g. phone tapping and imitating a crime.¹³⁷

Competition related offences have been criminalised rather extensively in Estonia, covering not just the hard-core restrictions, but also embracing repeated anticompetitive practices, such as abuse of a dominant position,¹³⁸ failure to perform obligations by an undertaking in control of an essential facility, implementing a concentration without permission to concentrate, or violating a prohibition on concentration or the terms of permission to concentrate.¹³⁹ Due to the complicated nature of competition law and consequently limited enforcement, Estonia decided to decriminalise all these offences, save anti-competitive agreements, effective from January 2015;¹⁴⁰ that is more in line with most Member States which operate criminal offences in addition to administrative proceedings. Potentially, the limited scope of criminal offences in Estonia may improve the enforcement of the EU competition rules. This is because there is currently a clear priority by the ECA (Estonian Competition Authority) to pursue criminal enforcement of domestic competition

¹³⁵ Either the Estonian Competition Authority or the Prosecutor's Office may initiate a criminal investigation with regard to anticompetitive practices. After the Competition Authority has concluded its investigation, the case will be fully taken over by the Prosecutor's Office, which will then forward the case to court if it is confident that there is sufficient evidence to prove an infringement. The Court of First Instance will start a criminal hearing. The decisions of the Court of First Instance are appealable to the Court of Second Instance and finally, as a last resort to the Supreme Court. For further discussion, see M. Peterson and G. Kuru, Estonia: Overview of the law and enforcement regime relating to cartels, In N. Parr & E. Burrows (eds.), *Cartels: Enforcement, Appeals & Damages Actions*, Global Legal Group, at 63-68.

¹³⁶ For instance, the amendment to the Competition Act in 2013 in Estonia further aligns the Act with provisions which allow the Competition Authority to use the rights granted to the NCAs pursuant to Regulation 1/ 2003 for establishing interim measures and approving commitments. Therefore, the ECA now may on its own initiative and in the case of urgency issue a precept to a natural or legal person to perform a required act or refrain from an illegal act if there is a risk of serious and irreparable breach of competition as set out in the Articles 101 and 102 TFEU or domestic equivalents. With the amendments to the Competition Act the ECA has also been given a right to approve commitments proposed by an undertaking to remedy disturbance in the competitive situation without taking a final position on whether the violation occurred or not.

¹³⁷ Prior authorisation from the court is required in both cases. For further discussion, see M. Peterson and G. Kuru, Estonia: Overview of the law and enforcement regime relating to cartels, In N. Parr & E. Burrows (eds.), *Cartels: Enforcement, Appeals & Damages Actions*, Global Legal Group, at 63-68.

¹³⁸ Penal Code, passed 6.06.2001, RT I 2001, 61, 364, entry into force 1.09.2002, para 399(1)

¹³⁹ Ibid, para 402.

¹⁴⁰ From 1 January 2015, all other offences are treated as misdemeanours for which the maximum fine is significantly smaller and imprisonment is not possible.

rules,¹⁴¹ which in turn leads to the enforcement of Articles 101 and 102 TFEU being overlooked. Several scholars concluded that divergent procedural rules and institutional settings have affected the enforcement of EU competition rules in Estonia.¹⁴² There is still an ongoing debate on a potential new penal law approach to anti-competitive agreements and related procedural rules.

Finally, the development of the institutional and enforcement framework in Croatia has not been without complications. Initially, the Croatian Competition Agency (CCA) was empowered to establish infringements of competition law, but only the Croatian misdemeanour courts could directly sanction infringing undertakings. Yet, the misdemeanour courts typically waited until administrative courts issued judgments provided the Agency's decisions were appealed. Therefore, this process caused excessive delays leading to a lapse of the period of prescription and as a rule of thumb the misdemeanour courts rarely issued fines, which eventually resulted in inadequate protection of competition in Croatia.¹⁴³ For instance, in 2007 the CCA unveiled a cartel between 14 bus operators, where the parties were found to have fixed bus fares on some routes. Yet, the court only imposed a symbolic fine of K 10,000 (approximately €1,314) on only one undertaking involved and K 6,000 (approximately €788) on the natural personnel in charge.¹⁴⁴ Additionally, before conducting a dawn raid, the CCA must ask the administrative court to issue a warrant with the implicated undertaking having the right to be heard before the search, which jeopardised any surprise effect of the planned dawn raid. This is why this instrument of a dawn raid was never used until October 2010, when the CCA became authorised to do so.¹⁴⁵

In preparation to the accession of EU, the new Competition Act of October 2010¹⁴⁶ introduced a number of amendments encompassing the institutional strengthening of the Agency in terms of its powers and tools. Infringements of competition rules are no longer treated as misdemeanors, instead, they are considered *sui generis* violations and

¹⁴¹ For instance, Svetlicinii claims that a significant part of the resources of the ECA's Competition Division is directed towards investigation of criminal offences. For further discussion, see A. Svetlicinii, 'Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence' (2014) 7(9) *Yearbook of Antitrust and Regulatory Studies* 67-85. Furthermore, the Director General of the ECA, Mart Ots, expressed that the year of 2012 was considered the most successful year for decisions, where a conviction was made in three criminal cases handled by the ECA. See the ECA, Annual Report of 2012.

¹⁴² See Botta, Svetlicinii and Bernatt, n 45.

¹⁴³ J. P. Kaufman, 'Enforcement of competition rules in Croatia – challenges and the way forward' the paper presented at a pre-conference workshop *CFI Regional Conference on Business Environment Reform in South East Europe: "Growth and Competitiveness: Weathering the Crisis and Looking Ahead"*, Tirana, November 17, 2009. Available at: <http://web.efzg.hr/dok/PRA/jpecotic/Enforcement%20of%20competition%20rules%20in%20Croatia.pdf> (accessed on 1 November 2015).

¹⁴⁴ For further discussion, see F. Urlsberger, 'Croatia: Agency requires more force', *International Financial Law Review*, 1 October 2008. Available at: <http://www.iflr.com/Article/2025667/Croatia-Agency-requires-more-force.html> (accessed 1 November 2015).

¹⁴⁵ C. Haid and M. Bradvica, 'Ahead of Croatia's EU Accession – a Snapshot of Competition Law Enforcement and Anticipated Changes', 2013. Available: <http://roadmap2013.schoenherr.eu/competition-law-enforcement-and-changes/> (accessed 1 November 2015).

¹⁴⁶ Official Gazette (Narodne novine) 79/09. The new Competition Act was adopted by the Croatian Parliament on 24 June 2009.

the Agency is empowered not just to establish infringements but also to impose fines for the competition law infringements. The Act also brought significant changes to the procedural rules which were closely modelled on Regulation 1/2003, such as the statement of objections with the intention to ensure the right of defence, the notion of professional privilege, the introduction of leniency, the criteria on calculating fines, and the possibility of commitments. Equally, the Act broadened the investigative powers of the CCA through empowering it to conduct dawn raids. Most recently, the Competition Law of 2013 expanded the competence of the Agency even further allowing it to directly enforce Articles 101 and 102 TFEU. It is too early to assess its effectiveness in the enforcement of EU competition law, but it seems that the Croatian Competition Agency is now equipped to process case-handling and decision-making.

(iii). Judicial review and its obstruction

While the main emphasis of this article is on the NCAs and their capacity to enforce the EU competition provisions, admittedly, the decisions of the NCAs can be overturned by national courts. At the outset, the decision of NCAs of all the analysed Member States are subject to judicial review either to specialist courts (i.e. the Competition and Consumer Appeals Tribunal in Malta) or general administrative courts (i.e. Vilnius Administrative Court in Lithuania).¹⁴⁷ On the one hand, judicial review serves as the ultimate control of the legality of the public authorities' decisions. On the other hand, it can be an obstruction to the effective enforcement of competition law, especially in the new Member States due to judges' unfamiliarity with the principles of competition law analysis. The Croatian Orthodontic Society (COS) case is illustrative; in 2013 the Agency initiated ex officio proceedings against COS and established that orthodontists had concluded a minimum-pricing agreement, adopted a price list under the name 'Minimum prices for orthodontists' services', and published it on its website. The Agency fined the COS for the infringement of domestic equivalent of Article 101 TFEU and declared the price list null and void. Yet, surprisingly, the Agency's decision was overturned by the High Administrative Court on 20 April 2015. The Court held that the price list did not represent a prohibited agreement because it had never been applied in practice and had no obligatory effect on the COS's members. Given that there is no ordinary avenue for appealing the Court's ruling, the Agency had to resort to an extraordinary legal remedy – for the first time in its operation – by requesting the State Attorney's Office for an extraordinary review of the legality of the ruling to be conducted by the Supreme Court.¹⁴⁸

This case in Croatia illustrates that effective enforcement of competition law can be in jeopardy, if there are only limited remedies available and judges lack a basic knowledge of competition law and are unfamiliar with the European Commission's and European Courts' interpretations. It is important that national law facilitates Article 15(3) Regulation 1/2003 for the coherent application of Articles 101 and 102 TFEU and

¹⁴⁷ For further discussion on judicial review in all Member States, see *Pilot field study on the functioning of the national judicial systems for the application of competition law rules*, Final Report DG Justice under Multiple Framework Contract JUST/2011/EVAL/01, 17 March 2014.

¹⁴⁸ The Supreme Court decision is pending. See, Liszt, n 16.

domestic equivalents. For instance, *amicus curiae* observations by the European Commission were submitted in several cases in Slovakia. In its intervention to the Supreme Court the European Commission shed some light with regard to the parallel application of Article 102 TFEU and its domestic equivalent and the NCA's power to impose fines for an abuse of dominant position based on the general clause of the national provision equivalent to Article 102 TFEU.¹⁴⁹ Along similar lines, the European Commission's *amicus curiae* observations to the Slovak Supreme Court in the context of a case concerning the application of the concept of economic continuity and the effectiveness of fines in relation thereto pursuant to Article 102 TFEU, led to the original NCA decision being upheld in its entirety.¹⁵⁰

There are other more generic tools to secure the uniform application of EU competition law, such as the preliminary reference procedure pursuant to Article 267 TFEU, which has been applied extensively in some Member States. For instance, the preliminary reference procedure has been employed in Slovakia in the banks cartel case,¹⁵¹ where the AMO in 2009 sanctioned three banks for the cartel with the aim to exclude a competitor, AKCENTA, from the market and to take over its clients. On appeal, the Regional Court annulled the AMO's decision on the basis that AKCENTA ran a business in Slovakia without the licence required. On further appeal to the Supreme Court the questions were sent to the CJEU, which confirmed that that:

“[a]rticle 101 TFEU must be interpreted in such meaning that the fact that an undertaking concerned by the cartel agreement, which object is the restriction of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of that provision”.¹⁵²

Accordingly, the decision of the Regional Court was annulled upholding the AMO's decision.

Therefore, it seems that various tools, such *amicus curiae*, a request for the European Commission's opinion, or the preliminary reference procedure are of significant importance and should be more utilised in small 'newer' Member States to ensure the uniform application of Articles 101 and 102 TFEU by national courts across all Member States alongside ongoing training for national judges.

¹⁴⁹ Case *E.-P. v. Slovak NCA*, 04/04/2012. After the European Commission's observations, the Supreme Court overturned the first-instance review court's judgment and confirmed the original NCA infringement decision. Available at: http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html (accessed 29 October 2015).

¹⁵⁰ Case *Železničná spoločnosť Cargo Slovakia, a.s.*, 2010. Available at: http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html (accessed 29 October 2015).

¹⁵¹ Slovenská sporiteľňa, a. s., Všeobecná úverová banka, a. s. and Československá obchodná banka, a. s., Decision No. 2009/KH/1/1/030 and decision No. 2009/KH/R/2/054.

¹⁵² Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* ECLI:EU:C:2013:71, at para 21.

VIII. CONCLUDING REMARKS

The decentralised nature of Regulation 1/2003 means that all Member States are now faced with complex EU competition cases and have an obligation to enforce Articles 101 and 102 TFEU once the effect on trade between the Member States criterion is met. Therefore, the article has presented a race track for small ‘newer’ Member States in their enforcement of EU competition law with some hurdles in their way. At the heart of the paper is an argument that ‘smallness’ does matter in the enforcement of EU competition law. First of all, ‘smallness’ in this article has been addressed in the context of the NCA’s limited resources due to their size and development level of their economies. Yet, they must have the same capacity in the context of basic equipment as in large Member States to be able to enforce Articles 101 and 102 TFEU, as the same rules must be applied uniformly across the EU. To address their ‘smallness’ the analysed Member States have employed various tools, including prioritisation policies and the ability to refocus resources on the most severe anti-competitive cases and the creation of integrated multi-functional NCAs in some Member States, which embrace competition authorities and sectoral regulators. Secondly, in a very similar set of arguments lie further exposures of small countries to enforcement of EU competition rules due to their integrated national markets. Given openness to trade in all Member States, there are numerous industries where scale economies easily exceed the demand of a small country and many relevant markets overstep national borders. Thirdly, even if the practice may affect trade between Member States, the undertakings from small countries may struggle to prove the existence of an EU interest and therefore, the European Commission will not be prepared to release the NCA’s duty of its competence pursuant to Article 11(6) Regulation 1/2003. This is because the European Commission is not obliged to verify whether the NCA concerned has the necessary institutional, financial and technical means to accomplish the task entrusted to it by the regulation. Finally, given that the NCAs are the primary public enforcers of the EU competition provisions¹⁵³ and there is an expectation for a broad interpretation of the element of ‘effect on trade between Member States’, this criterion should be easily triggered in small Member States and therefore, in most cases Articles 101 and 102 TFEU should be applied instead or simultaneously with domestic equivalents. Admittedly, recently introduced prioritisation policies will also place emphasis on the EU competition provisions leading towards the fading application of national law, especially in the context of Article 101 TFEU in small Member States.

Building on further distinctions between ‘older’ and ‘newer’ small Member States stemming from the fact that the NCAs and national courts lack experience in the application and enforcement of competition law and still developing a culture of competition, the paper has further compared the statistical data on the number of EU competition cases investigated in these countries. Surprisingly, the ‘newer’ Member States are catching up with the ‘older’ Member States in their enforcement of Articles 101 and 102 TFEU. Given that there were a few exceptions to this finding, the paper

¹⁵³ During a period of 1 May 2004 to 31 December 2012, the NCAs adopted 88% of all decisions on Articles 101 and 102 TFEU. See *Ibid*, Wils, fn. 2.

further elaborated on the potential obstacles that led to a lower number of cases in Croatia, Estonia, and Malta. While there is a burgeoning movement to criminalise cartel activity in several Member States of the EU, it seems that the small 'newer' Member States, such as Estonia¹⁵⁴ and Malta are refocusing their competition enforcement towards decriminalisation. Estonia's extensive focus on criminal offences, has potentially led to under-enforcement of EU competition enforcement; saying that, public competition enforcement via three different channels and complexity of different procedures has also contributed to this outcome. Further reforms have taken place in both jurisdictions to facilitate the enforcement of competition law. Interestingly, Estonia and Malta have the most integrated NCAs out of all analysed Member States with the sectoral regulatory functions (and consumer protection in case of Malta) as well as competition supervision merged in a single authority for better resource allocation. However, there is no evidence to suggest that their multi-function authorities to blame for a lower number of EU cases in their jurisdictions. On the contrary, Estonia's synergy work has been recently tested in several cases.¹⁵⁵ While some 'newer' Member States, such as Estonia started applying the harshest sanctions from the beginning of its modern competition enforcement, others, such as Croatia opted for a soft start with symbolic fines being imposed. Even though the NCA of Croatia has taken several steps to improve its investigative as well as decision-making powers, yet its national laws should also facilitate *amicus curiae* and a better use of the preliminary reference procedure in order to avoid the NCA's decisions being overturned by inexperienced national courts. The near future will display Croatia's ability to effectively enforce EU competition law.

It seems that all the NCAs of these small 'newer' Member States are constantly developing their policies to overcome hurdles for effective enforcement of competition law. These reforms are essential given that these countries are more exposed to complex EU competition cases. The finish line is not quite reached, nevertheless, there are developments taking place towards that direction.

¹⁵⁴ Criminal offence still applies to restrictive agreements in Estonia.

¹⁵⁵ Such as AS Tallinna Küte. See ECA, Annual Report of Estonia, 2014.